

1
2
3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 AECON BUILDINGS, INC.,

8 Plaintiff,

9 v.

10 ZURICH NORTH AMERICA, et al.,

11 Defendants.
12
13

Case No. C07-832MJP

ORDER GRANTING IN
PART AND DENYING IN
PART MOTION FOR
PARTIAL SUMMARY
J U D G M E N T R E :
L I M I T A T I O N O F
AECON'S DAMAGES

14 This matter comes before the Court on Defendant Zurich's motion for partial summary
15 judgment regarding limitation of Aecon's damages. (Dkt. No. 140.) Aecon opposes the motion.
16 (Dkt. No. 181.) Having considered the motion and response, Zurich's reply (Dkt. No. 194), all
17 documents submitted in support and the balance of the record, and having heard oral argument
18 on the matter, the Court GRANTS IN PART and DENIES IN PART Zurich's motion.

19 **Background**

20 The parties and the Court are familiar with the facts in this case and the Court need not
21 repeat many of them here. In brief, this action arises from claims made by the Quinault Indian
22 Nation ("the Quinault") against Aecon Buildings, Inc. ("Aecon") regarding the construction of a
23 casino and hotel project in Ocean Shores, Washington. Aecon was the general contractor for the
24 project. Chinook Builders, Inc. ("Chinook") and Western Partitions, Inc. ("Western Partitions")
25 were two of the subcontractors Aecon hired to work on the project. Construction commenced in
26 May 1998 and was substantially completed on June 9, 2000. (Dkt. No. 134, Blood Decl., Ex. 1 at
27

1 ZC 000665.) In April 2004, the Quinault contacted Aecon alleging defects in the building
2 structure that is part of the Quinault project. In May 2005, Aecon sued the subcontractors in
3 King County Superior Court.¹ See Aecon v. Vandermolen Const., Cause No. 05-2-03044-5 SEA.
4 In May 2006, Aecon also tendered the Quinault's claims to Chinook and its insurer, Hartford,
5 and to Western Partitions and its insurer, Zurich, who had added Aecon as an "Additional
6 Insured" under their respective policies.² Hartford and Zurich refused to defend or indemnify
7 Aecon. Aecon partially settled the Quinault's claims in early June 2006 for approximately \$1.9
8 million and fully and finally resolved the dispute on January 31, 2007, for \$3.75 million after a
9 final mediation proceeding. (Dkt. No. 105-10, 105-14.) The settlement was funded by Aecon's
10 insurers, St. Paul Travelers ("St. Paul") and American Home Assurance Co. ("American
11 Home"), a member of American Insurance Group ("AIG") under comprehensive general liability
12 policies. (Dkt. No. 139-2, Grace Dep. at 26-27; Dkt. No. 185, Martens Decl. ¶ 2.) Aecon
13 contributed \$118,000 of its own funds to the settlement and its defense. (Dkt. no. 139-2, Ex. E,
14 Paul Dep. at 9, 42.) Aecon initiated this suit in April 2007, claiming that Hartford and Zurich
15 breached their duties to defend and indemnify Aecon, breached their duty to act in good faith,
16 violated the Washington Consumer Protection Act, and acted negligently. (Dkt. No. 3, Compl. at
17 6-7.)

18 In September 2007, Aecon moved in the underlying superior court case for a
19 determination of the reasonableness of its settlement with the Quinault. Aecon included with its
20 motion a report from its expert, Rocco Romero. (See Dkt. Nos. 43, 43-5 at 93.) Mr. Romero's
21 report assessed that costs of repair attributable to Western Partitions' work equaled \$252,269.

23 ¹ Aecon did not initially sue Chinook, but amended its complaint on June 7, 2006, to
24 include claims against Chinook. (Dkt. No. 92, Ex. 6.)

25 ² The Court refers to Zurich North America, Zurich American Insurance Company,
26 Northern Insurance Company of New York, and Valiant Insurance Company collectively as
27 "Zurich." The Court refers to Hartford Casualty Insurance Company (referred to by Plaintiff as
Hartford Insurance Group) as "Hartford."

1 (Dkt. No. 141, Sparling Decl., Ex. F at 21.) Aecon also submitted the declaration of James
2 Paustian, a construction expert retained by the Quinault to address scope of repair and allocation
3 issues. (Sparling Decl., Ex. G.) Mr. Paustian’s declaration included a revised costs estimate he
4 had prepared for the Quinault that estimated repair costs related to Western Partitions’ work at
5 \$148,442. (Id. at 16.) The superior court denied the motion for a reasonableness determination
6 on procedural grounds, ruling that “the court does not have authority under RCW 4.22.060 to
7 determine the reasonableness of the settlement between Quinault and Aecon because that
8 proceeding was never before this court.” (Dkt. No. 43-8.) The superior court denied Aecon’s
9 motion for reconsideration on the issue. (Dkt. No. 43-12.)

10 In March 2008, Aecon filed a motion in this case requesting that this Court determine the
11 reasonableness of the Quinault-Aecon settlement. (Dkt. No. 42.) Included with the materials
12 filed were the materials Aecon had filed in support of its similar motion in superior court. Thus,
13 Aecon included the reports prepared by Mr. Romero and Mr. Paustian. (Dkt. Nos. 43-4, 43-5.)
14 On April 29, the Court denied the motion, concluding that, in light of the superior court’s ruling
15 on the matter, collateral estoppel precluded the Court from making a reasonableness
16 determination of the Quinault-Aecon settlement. (Dkt. No. 70.)

17 Zurich now moves for an order applying the doctrine of judicial estoppel to limit the
18 indemnity portion of Aecon’s damages to those amounts the experts estimated in relation to
19 Western Partitions work.³ More broadly, Zurich requests that the Court limit Aecon’s damages
20 to damages arising from Western Partitions’ work. Zurich also requests that the Court subtract
21 the amount it already paid Aecon to settle Aecon’s claims against Western Partitions in the
22 underlying case. In response, Aecon argues that judicial estoppel is inapplicable and that,
23 regardless, the presumptive measure of damages against Zurich — who has already been found
24 by this Court to have acted in bad faith — is \$3.75 million, the Quinault-Aecon settlement

25
26 ³ Zurich initially asked the Court to limit all of Aecon’s damages, but clarified in its
27 reply brief that it only seeks to limit Aecon’s indemnity damages.

1 amount.

2 Discussion

3 I. Summary Judgment Standard

4 Summary judgment will be granted when there is no genuine issue as to any material fact
5 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party
6 seeking summary judgment bears the initial burden of informing the court of the basis for its
7 motion, and of identifying those portions of the pleadings and discovery responses that
8 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S.
9 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must
10 affirmatively demonstrate that no reasonable trier of fact could find other than for the moving
11 party. Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986). On an issue where the
12 nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by
13 pointing out to the district court that there is an absence of evidence to support the non-moving
14 party's case. Catrett, 477 U.S. at 325. If the moving party meets its initial burden, the opposing
15 party must then set forth specific facts showing that there is some genuine issue for trial in order
16 to defeat the motion. Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986).

17 II. Limitations on Aecon's Damages

18 A. Judicial Estoppel

19 Zurich argues that Aecon should be estopped from seeking damages beyond those
20 assessed by the experts in the underlying case. The Washington Supreme Court recently
21 described the doctrine of judicial estoppel and the elements to be considered in determining
22 whether it should be applied:

23 Judicial estoppel is an equitable doctrine that precludes a party from asserting one
24 position in a court proceeding and later seeking an advantage by taking a clearly
25 inconsistent position. The doctrine seeks to preserve respect for judicial proceedings,
and to avoid inconsistency, duplicity, and ... waste of time. . . .

26 Three core factors guide a trial court's determination of whether to apply the judicial
27 estoppel doctrine: (1) whether a party's later position is clearly inconsistent with its
earlier position; (2) whether judicial acceptance of an inconsistent position in a later

1 proceeding would create the perception that either the first or the second court was
2 misled; and (3) whether the party seeking to assert an inconsistent position would
3 derive an unfair advantage or impose an unfair detriment on the opposing party if not
4 estopped. These factors are not an exhaustive formula and additional considerations
may guide a court's decision. Application of the doctrine may be inappropriate when
a party's prior position was based on inadvertence or mistake.

5 Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39 (2007) (internal citations and quotation
6 marks omitted). Other factors to consider include the following:

7 (1) [t]he inconsistent position first asserted must have been successfully maintained;
8 (2) a judgment must have been rendered; (3) the positions must be clearly
9 inconsistent; (4) the parties and questions must be the same; (5) the party claiming
estoppel must have been misled and have changed his position; (6) it must appear
unjust to one party to permit the other to change.

10 Markley v. Markley, 31 Wash.2d 605, 614-15 (1948), cited with approval in Arkinson, 160
11 Wn.2d at 539.

12 The Court concludes that application of the doctrine is not warranted here. First, in the
13 underlying case, Aecon presented expert testimony regarding the cost of repairing Western
14 Partitions' work. Here, Aecon seeks to use the settlement as a presumptive measure of damages
15 caused by Zurich. These positions are not inconsistent. Second, neither the superior court nor
16 this Court has relied on the experts' opinions because neither court decided whether the
17 underlying settlement was reasonable. Finally, Zurich has not been "misled" to believe that
18 Aecon was only seeking damage amounts identified by the experts in the underlying case.
19 Therefore, Aecon is not judicially estopped from seeking damages from Zurich — whether
20 indemnity damages or other types of damages — that go beyond those identified by Mr. Romero
21 and Mr. Paustian.

22 **B. Offset**

23 Zurich argues that it should be able to offset any damages amount by the \$65,000 it paid
24 to Aecon to settle Aecon's claims against Western Partitions in the underlying action. "Under
25 the Federal Rules of Civil Procedure, a party, with limited exceptions, is required to raise every
26 defense in its first responsive pleading, and defenses not so raised are deemed waived." Morrison

1 v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005) (citing Fed.R.Civ.P. 8(c); Fed.R.Civ.P. 12(b);
2 Fed.R.Civ.P. 12(g)). A party asserting that it deserves an offset must therefore raise the issue in
3 its first responsive pleading because it is an affirmative defense. See Locke v. City of Seattle,
4 133 Wn. App. 696, 713 (2006). Here, Zurich concedes that it did not raise offset as an
5 affirmative defense in its answer. (Reply at 6; see also Dkt. No. 25.) Zurich argues that,
6 regardless, any damages should be reduced by the \$65,000 previously paid to Aecon regardless
7 to prevent a double recovery. Zurich cites Eagle Point Condo. Owners Ass’n v. Coy, 102 Wn.
8 App. 697 (2000), for support. In that case, the Washington Court of Appeals stated: “It is a basic
9 principle of damages, both tort and contract, that there shall be no double recovery for the same
10 injury.” Eagle Point, 102 Wn. App. at 702. But Eagle Point does not discuss whether that
11 principle overrides the procedural rule that affirmative defenses must be pled. Finally, Zurich
12 also cites Fed. R. Civ. P. 15(b), which provides that a party may move to amend its pleadings to
13 conform them to the evidence at trial. See Galindo v. Stoodly Co., 793 F.2d 1502, 1513 (9th Cir.
14 1986). Zurich has not cited and the Court is not aware of any case law suggesting that this rule
15 applies before the parties have gone to trial.

16 Nevertheless, the Court concludes that Aecon would not be prejudiced by Zurich
17 amending its answer now to include the affirmative defense of offset. Aecon was aware of the
18 underlying settlement amount and was not misled to believe that Zurich would not seek an offset
19 here. Zurich is directed to promptly amend its answer to include the affirmative defense of
20 offset.

21 **C. Contractual Limits**

22 Zurich argues that Aecon should not be able to recover any more in “indemnity” damages
23 (i.e., damages attributable to the costs of repairing faulty subcontractor work) than can be
24 attributed to Zurich’s named insured’s work on the Quinault project. This premise flows from
25 Aecon’s status as an additional insured under the Western Partitions’ policies “with respect to
26 covered . . . property damage . . . which results from [Western Partitions’] work under [its]
27

1 contract [with Aecon].” (Sparling Decl., Ex. A at 8.) Under the plain language of the contract,
2 Aecon is not insured by Western Partitions’ insurer for damages arising from other
3 subcontractors’ work. Thus, the “indemnity” portion of Aecon’s damages must be limited to
4 amounts attributable to Western Partitions’ faulty work on the project.

5 **D. No Joint and Several Liability**

6 Contrary to Aecon’s assertion otherwise, the defendant insurers here are not jointly and
7 severally liable for the unrecovered balance of the Quinault-Aecon settlement. Aecon cites
8 Gruol Construction Co. v. Insurance Co. of North America, 11 Wn. App. 632, 637 (1974) and
9 American National Fire Insurance Co. v. B&L Trucking & Construction Co., 134 Wn.2d 413
10 (1998), for the proposition that the insurers are jointly and severally liable and that they bear the
11 burden of apportionment. Neither of these cases is applicable. Gruol involved an action brought
12 by a contractor against his three insurers for failure to defend against an action brought against
13 him for dry rot damage to a building. 11 Wn. App. at 633. The court of appeals held that the
14 insurers were jointly and severally liable for the damage, which, although continuing over a
15 period of time, constituted a single injury. The court held that “[i]n a dispute between an insured
16 who has sustained damages of a continuing nature, and the insurance carriers providing
17 coverage, the burden of apportionment is on the carriers.” Id. at 637. Similarly, in B&L
18 Trucking, the Washington Supreme Court held that in a case involving pollution leaching over
19 time from smelter slag used as ballast, where the policy does not provide for a pro rata
20 allocation, the various insurers who successively provided general liability coverage are jointly
21 and severally liable, even for periods when the insured was not insured by anyone. 134 Wn.2d at
22 428-29. Aecon presents no legal or factual basis for extending that joint and several liability rule
23 to the two remaining subcontractor insurers here, where, unlike in B&L or Gruol, there is no
24 single injury caused by a single insured, the injury is not ongoing and continuous, and where
25 multiple insurers did not insure the same risk over time. Zurich and Hartford are therefore not
26 jointly and severally liable for the underlying damage here.

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7

- 2
- 3
- 4
- 5
- 6
- 7
- 8

9

- 0
- 1
- 2
- 3
- 4

7
8
9


- 0
- 1
- 2
- 3
- 4

5
6
7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

The clerk is directed to send copies of this order to all counsel of record.

Dated: August 29, 2008.


Marsha J. Pechman
United States District Judge